Supreme Court, U.S.
FILED
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NO. _____

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IN THE SUPREME COURT OF THE

UNITED STATES

ON PETITION FOR WRIT

OF CERTIORARI

JAMES B. WINKE, Petitioner

VS.

MARILYN ANN WINKE, Respondent, et al.

ON PETITION FOR WRIT OF CERTIORARI TO

THE IOWA SUPREME COURT

# PETITION FOR WRIT OF

# CERTIORARI

James B. Winke

507 Avenue E

Fort Madison, IA 5627(319) 372-2688

## QUESTIONS PRESENTED

Whether the trial court must follow the Iowa Rules of Court and its duty under the such rules to have before the trial court an indispensable party in order to determine the party's rights and liabilities?

Whether the issue of indispensable parties may be brought up for the first time on appeal?

Whether due process has been accorded the corporation, in a state court action involving a receivership, by notice or any other opportunity to be heard regarding its' rights thereto?

## LIST OF PARTIES

Marilyn Ann Winke
R.R. #5, Box 962
Ava, MO 65608-9117

Jerry C. Derby
Registered Agent for Progas Service, Inc..
Acting as Temporary Receiver of Progas Service, Inc.
2518 Quail Ridge Drive
Burlington, IA 52601

Jerry L. Potts
President of Jerry's Progas Service
P. O. Box 257
Eldon, IA 52554

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BEST AVAI

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that the Writ of Certiorari issue the review the judgment below.

OPINIONS BELOW

Cases in State Court:

The Opinion of the highest state the merits of the case appears at Appendix A to the petition and is unpublished

The opinion of the Iowa Court of Appeals appears at Appendix A to the petition and is unpublished.



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## JURISDICTION

From state court:

The date on which the highest state court decided my case was August 26, 2004. A copy of that decision appears at Appendix A.

A timely petition for rehearing was thereafter denied on the following date: February 01, 2005, and a copy of that order denying rehearing appears at Appendix C.

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV-Citizenship, Privileges and Immunities: Due Process: Equal Protection; Apportionment of representation; Disqualification of Officers; public debt: enforcement.

Section 1, All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abride the privileges or immunities of citizens of the United States; nor shall any State deprive any person for life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (cited in the United States Code Annotated-Constitution of the United States-Amendment 14).

"The guarantees of due process call for a "hearing appropriate to the nature of the case" cited in United States v. Raddatz 447 U.S. 677. "Elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the

pendency of action and afford them an opportunity to present their objects".. Cited in Mullane v. Central Hahover Tr. Co. 339 U.S. 306, 314.

## STATEMENT OF THE CASE

On August 13, 1995, the Lee County District Court of Iowa decreed that, in a Stipulation signed by the parties, James and Marilyn Winke, that, upon the one condition, transfer of stock in Progas Service, Inc.-an Iowa Corporation - be executed by promissory note to the corporation.

To the date of this Petition, no such execution of the original promissory note of Marilyn has been made.

The corporation has not be notified through original service of otherwise, of the Case No. EQEQ001597 in Lee County District Court of the proceedings in the appointment of a temporary receivership for its property and rights thereto.

The temporary receiver, appointed March 20, 1997, has sold the corporations section 1245 property via court order entered May 18, 2000 from which the Defendant in the Case No. EQEQ001597 appealed to the Iowa Supreme Court. Appeal for the Case No. 00-0864, Iowa Court of Appeals No. 4-471, was based

upon the fact that the indispensable party, Progas Service, Inc, was not before the court in the proceeding concerning the sale of the Temporary Receiver to Jerry's Progas Service, Eldon, IA of uncertain propane gas storage tanks. See Appendix K.

The indispensable party issue was made for the first time on appeal from the ruling of approving the offer of Jerry's Progas Service-also an Iowa Corporation- for $231,666.50 for 729 propane tanks.

The Iowa Court of Appeals affirmed the ruling on August 26, 2004. Defendant/Appellant appeal to the Iowa Supreme Court an Application Further Review, The Iowa supreme court denied further review on February 1, 2005.

## REASONS FOR GRANTING THE WRIT

1) The decision of the Iowa Court of Appeals, Appendix A, states that the parties were awarded equal ownership of Progas Service, Inc.,

See Appendix A, page 2, first paragraph.

2) The Stipulation & Agreement signed by the parties, Marilyn & James Winke states that:

"The transfer shall be conditional upon:

(A) each party signing a promissory note made payable to Progas Service, Inc. in the amount of forty thousand four hundred two dollars and twenty-three cents. ($40,402.23).

See Appendix F, (excerpted as to pertinent part) at Page 2 Paragraph 3.

3) To the date of this Ruling, May 18, 2000, and indeed to the date of this Petition, the Temporary Receiver did not have the original of Marilyn's Promissory Note according to his verbal statement to the Petitioner herein on or about June 1, 2000.

4) The Petitioner, James, is therefore sole owner of the stock of the corporation until the order, Appendix D, and in

accordance with Paragraph 4 of that document, is fulfilled upon delivery of the original promissory note, to the Temporary Receiver.

5) Appendix B, at page one, indicates that no attorney appeared for the corporation concerning the sale of Jerry Potts, d/b/a Jerry's Progas (*sic*) on his offer to purchase a portion of the corporation's assets involving propane tanks and property. See also Paragraph 7.

6) In Berl v. Crutcher, 60 F2nd 440, 444-445 it is stated that:

> "[13,14] The contention that prior receivership proceedings are pending in a state court of Texas of competent jurisdiction is easily disposed of *pf.* On the face of the papers, the proceeding in which the receiver was appointed was collusive. The corporation was an indispensable party to that proceeding, and was not brought in High on Receiver, Third Ed. Vol 2 § 290; Irvin v. Anthony Shoals Power Co. (C.C.A. 277 F. 926."

7) The issue that the corporation was an indispensable party was recognized in Iowa Court of Appeals as shows in

Appendix A, Page 2 at Appendix A, Page 3, the court did not consider the matter of indispensable party citing Meier v. Senecaut, 641 N.W.2nd 532, 537 (Iowa) 1974.

8) Meier, Id 536 States as follows:

"It is a fundamental doctrine of appellate procedure that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."

(Citation omitted) (Emphasis added).

9) In Ditch v. Hess, 212 N.W2nd, 442, 449 it is stated that:

"Rule 25(c) (currently Rule of Civ. Proc.,1.234(3) of the Iowa Rules of Court (2005) states, "if an indispensable party is not before court, it shall order him brought in." Does this mean indispensable parties are to be brought in if question first arises in appellate court? Juridic-answer this question in various ways. 5Mm. Jur. 2nd Appeal & Error § 588 at 56; 4 C.J.S. Appeal & Error §264b at 796. We are clearly with those which answer the question affirmatively. The leading case in Iowa is Tod V. Crisman, 123 Iowa 639,99 N.W. 693, 99 N.W. 685."

10) In Wright v. Standard Oil Co., 234 Iowa 1241, 15

N.W. 2nd 275, 277 (1944) the Iowa Supreme Court said that:

"The general principal of equity practice in that all persons materially interested, either legally or beneficially, in suit or other proceeding or possessing, a community of interest therein, should be joined as either plaintiffs or defendants thereto, irrespective of the relative importance or decree in their relationship, in order that a complete decree be made between them."

Cited in Mauer v. Rohde, 287 N.W.2nd 489, 494.

11) In Tod v. Crisman, ID 689 it is stated:

"The rule is different, however, when the omitted parties belong to the third class, and are indispensable to the final adjudication of the rights of the parties, for them the point may be raised for the first time on appeal. Parshall v. Moody, 24 Iowa, 214; Crosby v. Davis, 9 Iowa 98; 15 *Fncy*, P & P689 and cases collected.

12) In Gunner v. Town of Montezuma, 292 N.W.1 it is stated:

"This action is in equity, triable de novo in this court. For us to determine that controversy we should have all

indispensable parties before us. In the case Tod v. Crisman, *supra* we held that in defect of indispensable parties might be raised for the first time on appeal. We have also repeatedly held that in a action in equity triable do novo, where it appears that indispensable parties are not in court, the better practice is to remand the case with leave to bring in the necessary parties. Whitmer v. Board of Directors, 210 Iowa 239, 244, 230 N.W. 453; Swan v. Clark, 36 Iowa 560, 562; Parshall v. Moody, 24 Iowa 314, 319,; Crosby v. Davis, 9 Iowa 98, 100."

See also Nissen v. Nissen Trampoline Co. 39 N.W.2nd 92, 98, citing Ginnar.

13) In City of Cerdar Rapids v. Cox, 92 N.W. 216, 221 it is stated:

"It is well settled in this state that lack of indispensable parties may be raised for the first time on appeal from the judgment. Where the point is well taken the cause is not dismissed but remanded to the trial court for the purpose of bringing in the party or parties found to be indispensable.

See Tod v. Crisman, *supra*, and other precedents cited last above."

14) In City of Cerdar Rapids v. Cox, ID 221 it is stated that:

"..rules 25(c)(Iowa Rule of Civ. Proc.1.234(3) is mandatory.

That the order was made in a final adjudication on a portion of the issues did not require a dismissal of the action."

15) Ditch, ID 450 that: (Citing Whitmer ID at 244).

"We remand the case to the trial court, with directions that if the plaintiff still desires an adjudication upon the question attempted to be litigated, he (she) shall make all interested parties, including both districts, parties to the suit: (citations omitted).

16) The Petitioner herein asserts that the corporation is an indispensable party in any receivership action. See Berl v. Crutcher, 60 F.2nd 440: Irvin v. Anthony Shoals Power Co., 277 F. 926: French v. Gifford, 60 Iowa 148, 149 & United Slate, Tile and Composition Roofers, 56 A.2nd 28-30. See also 19 C.J.S. §766

pps. 427-428.

17) Notice to the indispensable party has never been made in this Case before the Lee County District Court of Iowa to the date of this Petition and the corporation's rights to property have been sold without such notice and an opportunity to be heard.

18) In the Brief of Amicus Curiae Gerald Derby, Appendix D, the Temporary Receiver states, at Part III, that, the corporation was represented by counsel on March 20, 1997 proceeding before Judge John C. Miller, (now on the Iowa Court of Appeals bench), and the counsel was Wm. Scott Power.

19) Wm. Scott Power was a witness at the May 17, 1997 proceeding after which Judge Miller appointed Jerry Derby.

20) Wm. Scott Power was not employed, and therefore, unauthorized to make an appearance for Progas Service, Inc. and no service of process was made upon the corporation under the Iowa Rules of Civ. Proc. or Iowa Code at BCA §490.302(7) and § 602.801(2).

> "1. **GENERAL POWERS.**
>
> Unless its articles of incorporation provide otherwise, a corporation has perpetual duration and

succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business an affairs, including without limitation power to do all of the following:

7. Make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds and other obligations which may be convertible into or include the option to purchase other securities of the corporation, and secure any of its obligations by mortgage or pledge of any of its property, franchises or income.

2. **Requirement for and duties of board of directors.**

2. All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation."

21) In Detter v. Schreiber, 619 N.W.2nd 13, 17, it is stated

that:

> "The court stated that where a small, closely held corporation is involved in the absence of clear understanding with corporate owners that attorney represent solely the corporation and not their individual interests, it was improper for the attorney to thereafter represent a third party whose interests were adverse to those of the stockholders and which arose out of a transaction which the attorney had handled for the corporation."

22) The Petitioner, James B. Winke, has been director of the corporation since December 28, 1988. See Appendix G.

23) The Aspelmeier Law Firm, Burlington, Iowa of which Wm. Scott Power is a partner, billed Progas Service, Inc. for legal services to 1/07/97 for conferences with Jim Miller. See Appendix H.

24) James W. Miller's Law Firm represented Marilyn Ann Winke, See Appendix I.

25) The Notice of Marilyn Ann Winkes' Invoking Option To Purchase the stock of James B. Winke was the subject of Jim

Miller's counsel to Marilyn on the Stipulation & Agreement option at Appendix I and also Appendix F., Paragraph 3.

26) Progas Service, Inc. is a separate entity from its officers, director and shareholders. See Wyatt v. Crimmins, 277 N.W.2nd 615, 616 citing Briggs Transportation Co. v. Starr Sales Co., 262 N.W.2nd 805, 809 (Iowa 1978).

27) In Appendix A, Page 2 under PER CURIAM, First Paragraph, the Iowa Court of appeals misstated the position of the Petitioner herein in that the Defendant, in Case No. EQEQ001597, never agreed to or requested for a receiver but rather, the Petitioner has resisted the appointment of a receiver for eight years in the Lee County District Court.

28) In Irvin, 928 ID, it is stated:

> "When the object of a suit is to sell property, put the purchaser in possession, and distribute the proceeds of the sale, the one in possession and holding title to the property is a necessary and indispensable party. Construction Co. V. Cane Creek, 155 U.S. 253, 15 U.S. Sup. Ct. 91, 39 L. Ed.; Willson v. Oswego Township, 151 U.S. 55,

14 Sup. Ct. 259, 38 L.Ed.; Moloney v. Gressler, 219 Fed. 104, 126, C.C.A. 618."

29) The Temporary Receiver and his attorney, Wm. Scott Power, stood to gain $20,000 each by the terms of the ruling of May 18, 2000. See Appendix B at Paragraph 9-F Application.

30) Iowa Rules of Civ. Proce at rules 25 (b,c), effective date January 24, 1997, states as follows:

"(b) **Definition of Indispensable Party**. A party is indispensable if the party's interest is not severable, and the party's absence will prevent the court from rendering any judgment between the parties before it; or if notwithstanding the party's absence the party's interest would necessarily be inequitably affected by a judgment rendered between those before the court.

(c) **Indispensable Party Not Before Court.** If an indispensable party is not before the court, it shall order the party brought in. When persons are not before the court who, although not indispensable, ought to be parties if complete relief is to be accorded between those already parties, and when necessary jurisdiction can be obtained by

service of original notice in any manner provided by these rules or by statute, the court shall order their names added as parties and original notice served upon them. If such jurisdiction cannot be had except by their consent or voluntary appearance, the court may proceed with the hearing and determination of the case, by the judgment rendered therein shall not affect their rights or liabilities. [Amended effective January 24, 1998]"

31) In Van Gundy v. Van Gundy, 56 N.W.2nd 43, 46 it is stated, in a dissolution action that:

"We have said several times these rules (Iowa Rules of Civ. Proc.) have the force and effect of statute." (Citations Omitted).

32) In Butler v. Woodbury County, 547 N.W.2nd 17, 20 it is stated that:

"Iowa Rules of Court, when the language of the rule or statue in clear, are to be accepted for what they say." (Emphasis added).

See Schiavone v. Fortune, 477 U.S. at 30 cited in Butler ID 20.

33) In Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S.

484,497, 104 it is stated by this Court that:

> "[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of suit asserts juridation over the person of the party served."

Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444, 445(1946).

34) Progas Service, Inc. is not before the courts in either the IA Supreme Court or the Lee County District Court via service of process which is the SINE QUA NON of personal jurisdiction. See Morton v. Meagher, 171 F. Supp. 611, 617 (E.D. Va. 2001.) (Emphasis retained).

35) Morton, Id 616, 617 states:

> "Service of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant. In the absence of such service (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant. (Citation omitted). Accordingly, one becomes a party officially, and is required to take action in that capacity, only upon service



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of summons or other authority asserting measure stating the time within which a party served must appear and defend. Unless a named defendant agrees to waive service, the summons continues to function as the SINE QUA NON directing any individual or entity to participate in a civil action or forego procedural or substantive rights. (citations omitted)."

Murphy Brothers, Inc v. Michetti Pipe Stringing, Inc. 526 U.S. 344, 344-45, 119 S. Ct. 1322, 1324, 143 L. Ed. 2nd 4 4 8 (1999).

36) This Court has stated that:

"An elementary and fundamental requirement of due process in any proceeding which to accorded finality, is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present objection." (citations omitted).

Mullane v. Central Hanover, 339 U.S. 306, 314.

37) "The guarantees of due process call for a hearing appropriate to the nature of the case." Cited in United States v. Raddatz, 477, U.S. 677.

38) The Petitioner herein asserts that sale of property, without the corporation objections deprives the corporation, not only from due process guaranteed by the U.S. Constitution at its XIII Amendment, but also deprives the corporation of its rights to determine shareholder status under Iowa Code whether by operation of the law or otherwise.

39) at Appendix B, Paragraph 5 Motion to Compel, the ruling of Judge Daniel P. Wilson ordering the Temporary Receiver to furnish the records of the corporation, has not, to the date of filing this Petition been furnished and the Temporary Receiver has refused to consent to releasing that information dating back to 1997. See Appendix J, Paragraphs 3rd and 4th.

40) Also, to the date of the Petition, the Temporary Receiver has not furnished, on accrued-basis any financial Statements of the Corporation since July 31, 1997 and subsequent to the order in Appendix E.

CONCLUSION

The Iowa Court of Appeals, in its decision of August 26, 2004, and the Iowa Supreme Court's denied of review on February 1, 2005, has sidestepped, by it's opinion to not accept the

indispensable party issue, a long line of case law in Iowa and the Iowa Rules of Civil Procedure which it is the Iowa Supreme Court's duty to enforce the statutory nature of the I.R. of Civ. Proc. When clear, not only to the court, but to all litigants. This has allowed, attorney Wm. Scott Power, to purportly at lease, under the guise of representing the corporation and then the Temporary Receiver, in controlling and eventually, selling the property of the corporation to there own benefit and the respondent, Marilyn .

The duty of the Lee County Court, under case law, and Iowa R. Civ. Proc. at Rule 25 (b, c) is clear that the corporation should be brought before the court to identify its shareholders and to bring the Temporary Receiver to account for his actions in possession if its' property. Obviously, the Defendant, which is deprived of his only asset for remuneration, does not have the resources to defend the corporation. Progas Service, Inc. Is defenseless.

Petitioner, James B. Winke request this court grant the Petition for Writ of Certiorari.

Respectfully submitted,

James Bernard Winke
507 Avenue E
Fort Madison, Iowa 52627
(319) 372-2688

Date: MAY 02, 2003

IN THE COURT OF APPEALS OF IOWA

No. 4-471 / 00-0864
Filed August 26, 2004

MARILYN ANN WINKE,
Plaintiff-Appellee,

vs.

JAMES BERNARD WINKE,
Defendant-Appellant.

---

Appeal from the Iowa District Court for Lee (North) County, Daniel P. Wilson, Judge.

The defendant appeals from the district court's ruling in a temporary receivership proceeding involving a corporation purportedly owned by the parties pursuant to the terms of a dissolution decree. **AFFIRMED.**

James Bernard Winke, pro se.

No appearances by appellee.

W. Scott Power and Brent Ruther of Aspelmeier, Fisch, Power, Engberg & Helling, P. L. C., Burlington, for amicus curiae, Gerald Derby, temporary receiver in proceedings below.

Considered by Huitink, P. J., and Hecht and Eisenhauer, JJ. Miller, J., takes no part.

**APPENDIX A**

PER CURIAM

The decree dissolving the Winkes' marriage awarded Marilyn and James equal ownership of Progas Service, Inc., a liquid propane gas business. Because of continuing disputes concerning the operation and ownership of Progas, the court granted the parties' request for appointment of a temporary receiver to facilitate resolution of the parties' disputes.

The present appeal arises from a district court order filed on May 18, 2000, which ordered an accounting of the business, ordered the receiver to provide business information to James, approved the receiver's second supplemental final report, and approved the sale of certain assets to Jerry Potts.

The court determined further proceedings should be held concerning an offer to purchase the business by Ben Winke.

In his pro se appeal, James raises the following issues: (1) a corporation is a separate entity; (2) Progas was not properly served notice in this case; (3) the court did not have jurisdiction over Progas; (4) Progas is an indispensable party; (5) Progas should be represented by a separate attorney; (6) an order was entered after the hearing before James could seek to bring in Progas as a party; (7) the ruling improperly modified the terms of

the parties' dissolution decree; and (8) only the board of directors of a corporation is authorized to sell assets.

Our rules of appellate procedure provided:

> Each division of the argument shall begin with a discussion, citing relevant authority, concerning the scope or standard of appellate review (e.g., "On error," "abule of discretion," "de novo" and shall state how the issue was preserved for review, with references to the placed in the record where the issue was raised and decided.

Iowa R. App. P. 614(1)(*f*). James's brief fails to follow this rule and does not state how any of his issues were preserved for appeal. We are not bound to consider a party's arguments when the brief fails to comply with the Iowa Rules of Appellate Procedure. *State v. Stoen,* 596 N.W.2d 504, 507 (Iowa 1999). A failure to follow the appellate rules can lead to summary dismissal of the appeal. *Inghram v. Dairyland Mut. Ins. Co.,* 215 N.W.2d 239, 239 (Iowa 1974).

Furthermore, the issues raised by James on appeal were not raised before the district court. We do not consider issues raised for the first time on appeal. *Meier v. Senecaut,* 641 N.W.2d 532, 537 (Iowa 2002). We do not consider James's arguments because they have not been properly preserved for our review.

We affirm the decision of the district court. Costs of this

appeal are assessed to James Winke.

AFFIRMED.

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THE IOWA DISTRICT COURT FOR LEE COUNTY

AT FORT MADISON

DATED MAY 18, 2000

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| | |
|---|---|
| MARILYN ANN WINKE,<br>Plaintiff,<br>v.<br>JAMES B. WINKE,<br>Defendant | No. EQEQ001597<br><br>RULING AND ORDER DIRECTING FURTHER PROCEEDINGS |

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Hearing held May 17, 2000, concerning several matters pending in this receivership proceeding, Plaintiff Marilyn Ann Winke was not present, but attorney, Robert P. Montgomery, appeared by telephonic conference call; Defendant James B. Winke appeared with his attorney, Brett A. Nelson; and Temporary Receiver Jerry Derby appeared with is attorney, Wm. Scott Power.

Record was made and/or additional information presented concerning the following items: (1)I. R.C.P. 215.1 notice filed August 3, 1999; (2) Application to Withdraw (Robert

Montgomery), filed May 15, 2000; (3) Second Supplemental Final Report for Temporary Receiver, filed May 11, 2000; (4) Motion for Accounting as Amended December 8, 1999 and January 20, 2000; (5) Motion to Compel, filed February 7, 2000; (6) Application for Payment of Fees and Expenses of Receiver and Attorney (1-23-98 and 8-11-98); (7) Jerry Potts' and Ben Winke's purchase offers.

## FINDINGS AND CONCLUSIONS

### NOTICE OF HEARING

1. Notice of hearing held May 17, 2000, was given by Case Coordinator Bonnie J. Eggers on or about May 10, 2000, by fax and/or ordinary mail to all counsel of record and to Marilyn Winke. As noted, Marilyn failed to appear at the May 17, 2000, hearing. The court was presented with a two-page communication from Marilyn, dated May 16, 2000, in which she noted that she does not want Mr. Montgomery representing her concerning this matter in which she objects to the short notice given for this hearing.

The Court notes that Mr. Montgomery and his firm are still of record for Marilyn, until their Application to Withdraw has been approved by the court. The issue of Marilyn's representation came

up at a telephonic conference hearing held March 2, 2000, and at previous times. Other than Mr. Montgomery's firm, no attorney has currently appeared of record on behalf of Marilyn in this case. No other party or counsel objected to the scheduling of the May 17, 2000 hearing.

Because of the serious matters involving the receivership that need addressed in the very near term; because of Marilyn's failure to appear at this and other hearings and to cause successor counsel of record to appear, and because of the circumstances as shown by the record in this case, the Court finds that all parties and counsel received adequate notice of the pendency of the May 17, 2000, hearing. Marilyn's objection to holding the hearing on May 17 is overruled.

I.R.C.P. 215.1 DISMISSAL

2. A "Notice by Clerk" was given and filed August 3, 1999. The Notice indicated that this case was subject to "the provision of Rule of Civil Procedure 215.1... and subject to dismissal if not tried prior to January 1, 2000, unless order is entered as provided in said rule."

The Court notes that these receivership proceedings were instituted subsequent to the Decree of Dissolution of Marriage,

filed in this case August 13, 1996, and may, therefore, not be subject to the dismissal provisions of I.R.C.P. 215.1. In the event, however, that Rules 215.1 applies, the Court finds that any dismissal which occurred pursuant to the August 3, 1999, notice was the result of oversight, mistake, or other reasonable cause. Further, that this receivership proceeding should be reinstated.

Among other things, the reasonable cause for reinstatement is shown, based upon the extremely protracted nature of this proceeding; the fact that a Notice of Appeal was filed on behalf of James February 19, 1999, Procedendo concerning which was issued October 15, 1999 (Application for Interlocutory Appeal was denied); this proceeding involves a receivership relating to an ongoing business, both of which are still active and pending.

To the extent the same may have been dismissed, pursuant to I.R.C.P. 215.1, this cause of action is reinstated. Final hearing/trial shall occur on or before December 19, 2000, to be set by the Court Administrator.

APPLICATION TO WITHDRAW

3. The Application to Withdraw, filed May 15, 2000, on behalf of Mr. Montgomery and his law firm seeks courts authority to withdraw as counsel for Marilyn. The record indicates that

Marilyn has repeatedly indicated that she no longer wishes Mr. Montgomery or his firm to represent her in this matter. No other party objects to the withdraw, but the Receiver and James have requested the Court order Mr. Montgomery's firm reimburse the receivership for a $10,000 retainer fee, which is alleged to have been paid by Marilyn to Mr. Montgomery's firm, from Progas Service, Inc. corporate funds.

The Court finds that the Application to Withdraw, filed May 15, 2000, should be granted, effective upon the filing of a withdrawal by Mr. Montgomery or his firm. The Receiver is authorized to pursue a claim, if any exists, concerning the $10,000 retainer fee. The withdrawal of counsel by Mr. Montgomery's firm shall not effect the Receiver, or any other party's rights to pursue a claim concerning the retainer. (Parenthetically, the Court notes that if any fees were inappropriately expended by Marilyn from Progas Service, Inc. corporate sources, the same could be recovered from Marilyn's share of any proceeds received from this receivership.)

Mr. Montgomery and his firm are directed to submit to this Court at P. O. Box 844, Centerville, IA 52544, a complete copy of their billing statement/statements to Marilyn Winke; attorney fee

agreements, if any; and any other information held by Mr. Montgomery's firm concerning the source of the fees paid by Marilyn to the firm and the nature of the work done by the firm on Marilyn's behalf. This information shall be submitted to the Court by May 31, 2000. The Court will make further determinations concerning the same after an in camera review of the information presented.

MOTIONS CONCERNING ACCOUNTING

4. In the Motion for Accounting, as Amended December 8, 1999; and January 20, 2000, a request was made for an independent audit of Progas Service, Inc. and it was suggested that CPA Ann M. Menke be appointed to conduct the same. Ms. Menke has indicated a willingness to conduct an unsigned audit of the records of the corporation, upon payment of a substantial retainer and the execution of waivers or hold harmless documents by Marilyn and James. The information provided establishes that sufficient funds have not been available to pay Ms. Menke's retainer, and neither James or Marilyn have indicated a willingness to sign a hold harmless or waiver agreement as it concerns Ms. Menke.

The Court finds that a full accounting of the business of

Progas Service, Inc. should be conducted, and that Ms. Menke is an appropriate person to do the work. However, the Court further finds that Ms. Menke's requests for a substantial retainer and hold harmless agreements signed by James and Marilyn and Receiver James Derby, is reasonable. The accounting is ordered, subject to conformance with Ms. Menke's requirements.

MOTION TO COMPEL

5. James has expressed concern that he has not been furnished with financial and other information concerning the operation of Progas Service, Inc. for a substantial period of time. James' Motion to Compel, filed February 7, 2000, sought production and exchange of requested information. The parties and counsel discussed the mechanics of an exchange of the information requested during a recess of the hearing held May 17, 2000. The Court finds that the information which is the subject of a Motion to Compel, filed February 17, 2000, should be provided by the Receiver to James. The Court further finds that the proposed Ruling on Motion to Compel and Protective Order, submitted by Mr. Power on behalf of Receiver Jerry Derby is reasonable, and the Court will execute the Ruling by separate entry this date.

## SECOND SUPPLEMENTAL FINAL REPORTS

## OF TEMPORARY RECEIVER

6. The Second Supplemental Final Report of Temporary Receiver, filed May 11, 2000, sets forth information concerning 14 different subject matter areas. Among other things the Court notes, and Mr. Derby's testimony at hearing held May 17, 2000, establishes that Progas Service, Inc. is experiencing severe cash flow problems. Among other things, the Receiver/corporation has had difficulty meeting payroll, maintaining health insurance for employees, buying product for sale, and satisfying judgments to creditors and accounts payable. Except as may be otherwise set forth in this Ruling, the Court finds that the Second Supplemental Final Report for Temporary Receiver, filed May 11, 2000, should be approved.

## JERRY POTTS' OFFER

7. At the hearing held May 17, 2000, Receiver Jerry Derby and his Attorney, Scott Power, presented information concerning an offer to purchase a portion of the Progas Service, Inc. assets by Jerry Potts, d/b/a Jerry's Progas, which operates in the Eldon, Iowa, area. Potts rents several tanks from Progas Service, Inc. and has for many years. Potts' offer is to purchase

approximately 1,100 propane tanks now in the field, located on the premises served by Jerry's Progas. In addition, to purchase a parcel of real estate located in Keosauqua, Iowa. Receiver's Exhibit 1 was received into evidence at the hearing held May 17, 2000, and contained information concerning the proposed Potts purchase, but was not a formal offer.

Pott's offer is based on a calculation of purchase price at approximately .55 per gallon, tank capacity. (The Court's understanding is that the offer from Potts includes approximately $223.475 for tanks and $15,000 for real estate and improvements.) Based upon the information presented, the Court finds that, once formalized, the Potts offer would be in the best interests of Progas Service, Inc. and this receivership. Among other things, the corporation is experiencing severe cash flow problems, which need addressed immediately; according to Mr. Derby, Mr. Potts has indicated a willingness and ability to conclude a proposed purchase in the very near term. In addition, the information presented indicates that Mr. Potts' offer is within the normal market range for similar assets.

The Court finds that once a formal written offer to purchase has been received by the Receiver or his Attorney from

Mr. Potts, that the Receiver is authorized to accept the offer and to execute all documents and do all things necessary to consummate the sale to Mr. Potts in as expeditious manner as is consistent with the orderly operation of the corporation and receivership.

Marilyn and James are granted a period of 7 days from the date of the submission of a written offer by Jerry Potts to match or exceed the offer, by submission of a written offer to the Receiver or his attorney, with verification of financing. Mr. Power shall make any offer received available to Marilyn and James, upon receipt.

BEN WINKE OFFER

8. On the morning of May 17, 2000, hearing, Ben Winke, who is the son of James and Marilyn Winke, presented the rough outlines of an offer to purchase the retail portion of the Progas Service, Inc. business. Outlines of the offer were set forth in Receiver's Exhibit 2, admitted at the hearing. In addition, Mr. Derby and Ben Winke testified concerning the offer. The offer includes a purchase price of approximately $509,386, with $250,000 paid up front, and a balance payable at the rate of $4,000 per month, due in 24 months, with 9 percent interest. The offer included maintenance of health insurance for James, Marilyn and

their son Burton.

The Court does not have sufficient information, nor is Ben Winke's offer sufficiently formalized, for a determination to be made in terms of acceptance or rejection of the offer. The Receiver is directed to request Ben Winke to submit a formal written Purchase Offer to the Receiver or his attorney, outlining the specifics and details of the purchase. The offer should be received on or before June 5, 2000. Upon receipt of the offer, Mr. Power is directed to forward a copy of the same to all counsel of record, to Marilyn Winke; and to the undersigned judge at P.O. Box 844, Centerville, Iowa 52544.

Mr. Powers is further directed to coordinate with all counsel, Marilyn and Case Coordinator Bonnie Eggers to schedule a telephonic conference hearing or in-person hearing concerning Ben Winke's offer to purchase and any further pending matters. The hearing should be held within one month of the receipt of a formal written offer by the Receiver from Ben Winke.

Marilyn and James are granted a period of 21 days from the date of the Receiver's service by mail of a copy of Ben Winke's offer, to match or exceed the offer, by submission of a written offer, with verification of financing.

## FEE APPLICATIONS

9. The Application for Payments of Fees and Expenses of Receiver and Attorney, filed January 28, 1998, seeks payment to the Receiver for fees and expenses in the amount of $43,565.51. Further, payment for attorney fees to Mr. Powers' firm and the Holbrook firm in the amount of $28,007.31.

The August 11, 1998, Fee Application requests payment to the Receiver in the amount of $1,510 and to his attorney in the amount of $14,005.16. The total requested by the Receiver is $45,075.51; for the attorney - $41,012.47; for a grand total of $87,087.98.

Substantial fees for the Receiver and his attorney will at some point undoubtedly be approved. Predictably, additional fees for the Receiver and his counsel will be requested for the period subsequent to the last application concerning the same, filed August 11, 1998. Given the magnitude of the fees requested, the current precarious financial condition of the corporation and receivership and the fact that counsel and the parties have not been given the opportunity to make record concerning the fee applications, the Court finds that final approval of the requested fees of the Receiver and his attorney should be deferred, pending

further hearing and proceedings. However the Court finds that the Receiver and his attorney may be paid the sum of $20,000 each for their services rendered, as shown in the applications, from proceeds of the sale of receivership/corporation assets, pursuant to the Jerry Potts offer, if such sale occurs.

The Receiver and his counsel should file any updated Application for Fees and Expenses for all work done and periods elapsed subsequent to the filing of the last application by June 5, 2000. As with other filings in this case, the original should be filed with the clerk, with copies to all counsel, Marilyn Winke, and the undersigned judge at P. O. Box 844, Centerville, Iowa 52544.

10. To the extent the Receiver is able to compile the information, the Court finds that the Receiver should file and serve a financial statement of the condition of Progas Service, Inc., within 30 days of the filing of this ruling, The financial statement should address all accounts payable, judgment creditors, accounts receivable, and should include an itemization of the assets of the corporation and their value.

11. The original of this Ruling and the Ruling on the Motion to Compel, and Protective Order will be filed with the clerk. The Court has caused a copy of these rulings to be faxed to

Attorney Brett A. Nelson at 309-794-2177; Attorney Wm. Scott Power at 319-754-7514; Attorney Robert Montgomery at 515-284-1704; Marilyn Winke at 319-372-6009; and the court administrator at 1-800-342-4496, this date.

IT IS SO ORDERED

Dated May 18, 2000

/s/ Daniel P. Wilson

DANIEL P. WILSON

JUDGE, 8TH JUDICIAL DISTRICT

IN THE SUPREME COURT OF IOWA

NO. 00-864

Lee (North) County No. EQEQ001597

Filed February 01, 2005

ORDER

MARILYN ANN WINKE,
Plaintiff-Appellee,

vs.

JAMES BERNARD WINKE,
Defendant-Appellant.

---

After consideration by this court en banc, further review of the above captioned case is denied.

Dated this 1st day of February, 2005.

THE SUPREME COURT OF IOWA

/S/ Louis A. Lavorato

Louis A. Lavorato, Chief Justice

Copies to:

James Bernad Winke
2185 303rd Avenue.
Fort Madison, IA 52627

W. Scott Power
321 N. Third St.
P. O. Box 1046
Burlington, IA 52601-1046

**APPENDIX C**

00-864.2

Marilyn Ann Winke
RR #5
P. O. Box 962
Ava, Mo 65608-9117

Attorney General
Attn: Pamela Griebel
Hoover Bldg.
L O C A L

Lawrence L. Marcucci
701 West Towers
1200 Valley West Drive
West Des Moines, IA 50266

IN THE SUPREME COURT, STATE OF IOWA

Docket No. 00-0864

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MARILYN ANN WINKE, )
Plaintiff/Appellee, )
vs. )
JAMES BERNARD WINKE, )
Defendant/Appellant. )

---

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR NORTH LEE COUNTY
THE HONORABLE DANIEL P. WILSON
Lee (North) County No. EQEQ001597

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# FINAL BRIEF OF AMICUS CURIAE GERALD DERBY

---

W. Scott Power #4585
Brent Ruther #16285
ASPLEMEIER, FISCH, POWER, ENGBERG & HELLING, P. L. C.
321 North Third Street, P. O. Box 1046
Burlington, IA 52601
Telephone: (319) 754-6587
Facsimile: (319) 754-7514

ATTORNEYS FOR GERLAD C. DERBY, TEMPORARY RECEIVER

**APPENDIX D**

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## MOTION TO DISMISS OR AFFIRM

The Temporary receiver as *amicus curiae* contends that because Appellant has failed to preserve any of the issues presented for review as stated in his brief dated August 10, 2001, no issues are properly presented for review and this appeal must be dismissed pursuant to Iowa R. App. P. 6.23(1), or the Trial Court order appealed from dated May 18, 2000 must be affirmed based up on the frivolous nature of the appeal with out review. Alternatively, the temporary receiver as *amicus curiae* contends the following issues are presented for review.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. **Appellant's failure to substantially comply with the Iowa Rules of Appellate Procedure with respect to forms of briefs requires dismissal of his appeal.**

Iowa R. App. P. 6.14(1) and (7)

Matter of Estate of DeTar, 572N.W.2d 178, 180-181(Iowa App. 1997)

Inghram v. Dairyland Mut. Ins. Co., 215 N.W.2d

239, 239 (Iowa 1974)

James v. Rosen, 203 N.W.2d 256 (Iowa 1972)

Olson v. Olson, 180 N.W.2d 427 (Iowa 1970)

II. **Appellant failed to preserve any of the issues raised in his Brief at the district court level and none of the issues raised may be considered by this court.**

Iowa R. Civ. P.1.904

Meier v. Senecaut, 641 N. W.2d 532 (Iowa 2002)

Smith v. Air Feeds, Inc., 519 N.W.2d 827 (Iowa App. 1994) *on subsequent appeal*, 556 N.W.2d 160 (Iowa 1996).

City of Muscatine v. Northbrook Partnership, 619 N.W.2d 362 (Iowa 2000)

III. **The corporation was before the court as a party at the time the receivership was ordered and appeared *via* counsel and Appellant's assertion to the Contrary is false.**

## STATEMENT OF THE CASE

This matter arises out of a dissolution of marriage action and settlement of that action. In the underlying dissolution of

marriage action, EQEQ001597 in the North Lee County District Court, the parties agreed to divide their corporation, Progas Services with both equally Appellant and his ex-wife Marilyn WInke becoming 50% shareholders. Because of subsequent disputes surrounding the corporation and a

deadlock between the two equal shareholders Appellant himself first

petitioned for a receivership. That petition was withdrawn and Marilyn Winke, the other 50% shareholder petitioned for a receivership. That petition was granted by the district court and at that time, the corporation appeared and was represented by counsel, specifically undersigned W. Scott Power who subsequently became the attorney for the receiver. Appellant's assertions that the corporation is not before the court is false and cannot be a basis for this appeal.

Since the time that the receiver was appointed, the receiver has attempted to take control of the corporate assets and sell assets to satisfy debts as required by the court and by statute. At every turn, including with this appeal, Appellant has frivolously and without support objected to the receiver carrying out his duties.

The order which is being appealed stems from the receivers attempts to execute his court ordered and statutory duties.

## ARGUMENT

**I. Appellant's failure to substantially comply with the Iowa Rules of Appellate Procedure with respect to forms of briefs requires dismissal of his appeal.**

Pursuant to Iowa R. App. P. 6.14(1)(d)(f) and 6.14(7) Appellant is required to make appropriate citations to the record, specifically in

this case, to the transcript of the hearing from which the appealed from

order stems, to support his assertions of error. Without such, the court is unable to properly review the matter and the action taken by the trial court. Appellant's brief filed on or about August 10, 2001 fails to make any reference to or cite to the record and does not substantially comply with the Iowa Rules of Appellate Procedure. As such, the appeal is subject to summary disposition and should be dismissed. Matter of Estate of DeTar, 572 N.W.2d 178, 180-181, *citing* Inghram v. Dairyland Mut. Ins. Co., 215N.W.2d 239, 239 (Iowa 1974), James v. Rosen, 203 N.W.2d

256 (Iowa 1972) and Olson v. Olson, 180 N.W.2d 427 (Iowa 1970). Although in Matter of Estate of DeTar the court granted Appellant the grace to review the matter despite appellant's failure to cite to the record or transcript, such grace is only granted where the court is able to do so without assuming a partisan role and undertaking the parties' research and advocacy. Matter of Estate of DeTar, *supra* at 181.

In the mater at bar, because it is the position of the temporary receiver that no issues have been preserved for appeal and no citations to the record by the temporary receiver can be made due to the lack of preservation, it would be impossible for the court to review this matter without specific citation by Appellant. Therefore, the court should not grant Appellant the grace and review the matter despite Appellant's
failure to cite to the record in compliance with the Iowa Rules of Appellate Procedure and the matter should be dismissed for said failure.

## CONCLUSION

For the reasons set forth above the temporary receiver, as *amicus curiae*, submits that this appeal must be dismissed and the trial court's Ruling and Order Directing Further Proceedings dated

May 18, 2000 be affirmed.

**II. Appellant failed to preserve any of the issues raised in his Brief at the district court level and none of the issues raised may be considered by this court.**

It appears from page 1 of Appellant's Brief that he raises nine issues for appeal as follows:

(1) whether a[n] (*sic*) Iowa Corporation is a distinct and separate entity from its shareholders, officers or directors.;

(2) whether a corporation (*sic*) must be served via service of process in order for a Court to have power over it.;

(3) whether a corporation may be deprived of its property without due process as guaranteed by the United States and Iowa Constitutions at U.S.C.A. Const. Amendments 5 and 14 and I.C.S. Art. 1 Section 9, Respectively.;

(4) whether a[n] (*sic*) indispensable party not being before the trial court may be brought up for the first time on appeal.;

(5) whether a corporation in Iowa is required to appear via attorney.;

(6) whether a judge, who is allowed further hearing in open

court, can surprise the litigant by denying such hearing prior to ruling.;

(7) whether the Final Decree in Dissolution can be modified when self-executing.;

(8) whether the Board of Directors of Progas Service, Inc. authorized any sale of property of the corporation.; and,

(9) whether attorney for Receiver can be paid fees without application for employment.

A review of the transcript of the May 17, 2000 hearing which resulted in the May 18, 2000 Order being appealed from reveals that not one of these issues was ever raised during the hearing or in the pleadings leading up to that hearing. (Appendix Pp.21-31.[1]Nor did Appellant ever file any post-hearing motions pursuant to Iowa Rules of Civil Procedure. Specifically Appellant filed no Motion pursuant to

Iowa R. Civ. P. 1.904 (formerly Iowa R. Civ. P. 179) to enlarge or amend the findings and Order of the Trial Court.

"It is a fundamental doctrine of appellate review that issues must ordinary be both raised and decided by the District Court

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[1]Appellant only designated limited pages of the transcript from the May 17th hearing referenced in his Brief for inclusion in the Appendix which are cited herein.

before we will decide them on appeal." Meier v. Sennecaut III, 641 N.W.2d 532, 537 (Iowa 2002) *citations omitted.* "The reason for this principal relates to the essentially symmetry required of our legal system. It is not a sensible exercise of appellate review to analyze facts of an issue 'without the benefit of a full record or lower Court determination. [ ]'".*Id* at 537, *citations omitted.*

Furthermore, the Court in Meier went on to point out that it is a principle of law that if a trial Court fails to rule on an issue raised by a party, that party has the burden, in order to preserve error for appellate consideration, to file a Motion requesting a ruling, specifically a Motion pursuant to Iowa R. Civ. P. 1.904 (formerly Iowa R. Civ. P. 179). *Id.* At 537. *See also* Smith v. Air Feeds, Inc., 519 N.W.2d 827, 832 (Iowa App. 1994) *considered on further review* 556 N.W.2d 160 (Iowa App. 1996). This requirement also applies to any Constitutional issues raised for the first time on appeal, and said requirement would specifically apply to Appellant's assertion that the trial Court denied him of due process. *See* City of Muscatine v. Northbrook Partnership Co., 619 N.W.2d 362,*f.n.*2 at 368.

With respect, specifically, to Appellant's alleged error by the trial Court of failing to hold a further or subsequent hearing,

that portion of the Order is either moot or was not presented by Appellant. At the conclusion of the hearing, the issue of offers by both Jerry Potts and Ben Winke to purchase corporate assets was discussed. While Appellant, by and through his attorney at the time, agreed that a further hearing should take place and that financial records should be reviewed prior to such hearing no specific request for a hearing was made by Appellant or his attorney. In any event, the Order specifically allowed both Appellant and his ex-wife and equal shareholder in the corporation, Marilyn Winke, to match or exceed any offer by Jerry Potts and allows for a telephonic or in-person hearing concerning any offer by Ben Winke. (Appendix Pp. 21-34 - *see f.n.*1). Appellant's complaint now that he was not given due process, was not allowed a hearing or asserting error by the District Court is baseless and frivolous. This is particularly true in light of the fact that no post-trial Motions to enlarge or amend were ever filed and no hearing was ever specifically requested by Appellant or Appellant's attorney at the time.

## CONCLUSION

For the reasons set forth above, the Temporary Receiver would respectfully submit that the Court on appeal affirm the

District Court's Ruling and Order Directing Further Proceedings dated May 18, 2000.

**III. The corporation was before the court as a party at the time the receivership was ordered, appeared *via* counsel and Appellant's assertion to the contrary is false.**

As stated above, this matter arose from a dissolution of marriage action between the Appellant and his ex-wife, Marilyn Winke. At the conclusion of the dissolution of marriage action, both parties agreed to a settlement, making each a fifty percent shareholder in the corporation, Progas Service, Inc. Appellant, James Winke, initially petitioned the Court for the appointment of a Receiver, when it was apparent a corporate deadlock and disputes between Appellant and his ex-wife was resulting in difficulty in operation of the corporation. Appellant apparently withdrew that Petition, and subsequently Marilyn Winke filed her own Petition for Appointment of Receiver. After being fully briefed, the Honorable John C. Miller, then a District Court Judge in the Eighth Judicial District, issued an order on March 20, 1997 appointing the current Temporary Receiver, Gerald Derby, pursuant to Iowa Code Chapter 680. At that time, undersigned Wm. Scott Power appeared for and was the attorney for Progas Service, Inc. That employment

ended shortly thereafter and undersigned became the attorney for the Temporary Receiver of Progas Service, Inc. Therefore, at the time the Temporary Receiver was appointed the corporation in fact appeared and appeared through counsel. If the corporation, Progas Services, Inc. is an indispensable party as Appellant claims, the Temporary Receiver submits that the corporation was a party to the Receivership proceeding and has had rights as a party throughout the entire proceeding. Appellant's claim now that the corporation has not been served and has not appeared is misleading, false and frivolous. Furthermore, the only two stockholders in this corporation, Appellant James Winke and Marilyn Winke, have appeared throughout these proceedings and have been involved with representation at various times from various attorneys.

## CONCLUSION

For the reasons set forth above, the Temporary Receiver would submit that the Court on appeal must affirm the District Court's Ruling and Order Directing Further Proceedings dated May 18, 2000.

Respectfully submitted this 30th day of June, 2003.

ASPELMEIER, FISCH, POWER,

ENGBERG & HELLING, P.L.C.

/S/ W. SCOTT POWER

W. Scott Power #4585

Brent Ruther #16285

321 North Third Street, P. O. Box 1046

Burlington, IA 52601

Telephone: (319) 754-6587

Facsimile: (319) 754-7514

ATTORNEYS FOR GERALD C.

DERBY, TEMPORARY RECEIVER

Original Filed.

ATTORNEY'S COST CERTIFICATE

The undersigned attorney for Amicus Curiae Gerald Derby certifies that the amount incurred by Amicus Curiae and producing necessary copies of this Brief was $12.18.

/s/ Brent Ruther

Brent Ruther

## CERTIFICATE OF FILING

I Brent Ruther, hereby certify that I will file the attached Final Brief of Amicus Curiae by depositing eighteen (18) copies to the Clerk of the Supreme Court, Statehouse, Des Moines, Iowa 50319 on the 30th day of June, 2003, by United States Mail, postage prepaid.

ASPELMEIER, FISCH, POWER,

ENGBERG & HELLING, P.L.C.

/S/ W. SCOTT POWER

W. Scott Power #4585

Brent Ruther #16285

321 North Third Street, P.O. Box 1046

Burlington, IA 52601

Telephone: (319) 754-6587

Fascimile: (319) 754-7514

ATTORNEY'S FOR GERALD C. DERBY,

TEMPORARY RECEIVER

## CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing instrument were placed in the U.S. Mail postage pre-paid this 30th day of June, 2002 and correctly addressed to:

James Bernard Winke
2185 303rd Avenue
Fort Madison, IA 52627

Pamela Griebel, Assistant Attorney General
Hoover Building, 2nd Floor
Des Moines, IA 50319-0001

Lawrence Marcucci
1200 Valley West Drive
701 West Towers
West Des Moines, IA 50266

Robert Montgomery
2910 Grand Avenue
Des Moines, IA 50312-3507

Marilyn Ann Winke
RR#5, Box 962
Ava, Mo 65608-9117

/s/ Brent Ruther

(Signature)

IN THE IOWA DISTRICT COURT FOR LEE COUNTY

AT FORT MADISON

In Re: The Marriage of Marilyn Ann Winke and James B. Winke

Upon the Petition of No. EQEQ001597

Marilyn Ann Winke,

Petitioner ORDER

And Concerning

James B. Winke,

Respondent

Pursuant to the terms of a stipulation incorporated in a Decree of Dissolution dated August 13, 1996, and after consluting with the parties,

IT IS HEREBY ORDERED AS FOLLOWS:

1. On or before September 19, 1997, each party shall select an appraiser who together, shall prepare an appraisal of the business known as Progas Service, Inc. and establish a purchase price for the stock of the Corporation on or before October 31, 1997.

2. On December 5, 1997, or such other date as the parties agree upon, a sealed bid auction will be conducted if both parties

wish to purchase the other party's share. The person submitting the highest bid shall be allowed to exercis his or her option to purchase. In the event of a tie, new sealed bids will be taken. In the event neither party chooses to purchase the Company, the Company will listed with a broker agreeable to the parties; or, if they cannot agree on the broker, the Court will select one.

3. The Receiver is ordered to allow the appraisers full and complete access to the corporate books and property sufficient to permit the appraisers to ascertain a purchase price.

4. The parties shall deliver the originals of their promissory notes in the amount of $40,402.23, each, to the receiver, and new stock certificates shall be issued in accordance with the requirements of the Stipulation.

5. Pursuant to the record made in open Court, all pending matters except as outlined above are ordered dismissed.

Dated and signed this 6th day of August, 1997.

/s/ D. B. Hendrickson
Judge of the Iowa District Court
Eighth Judicial District

Clerk to distribute copies to:
B J Jahns
D Bunger
James B. Winke
Power

IN THE IOWA DISTRICT COURT FOR LEE COUNTY

AT FORT MADISON

Filed May 4, 1995

In Re the Marriage of MARILYN ANN WINKE and JAMES B. WINKE

| | |
|---|---|
| Upon the Petition of | ) |
| MARILYN ANN WINKE, | ) Equity No. |
| | )CE1401(N)0595 |
| Petitioner | ) STIPULATION AND |
| And Concerning | ) AGREEMENT |
| JAMES B. WINKE, | ) |
| Respondent | ) |

COMES NOW the above-captioned parties and stipulate and agree as follows.

1. BACKGROUND INFORMATION: A Petition for Dissolution of Marriage was filed on August 25, 1994 and trial is currently scheduled for Monday, May 8, 1995 at 9:00 a.m. in the above-captioned court.

2. PARTIES, INTENT: The Petitioner, Marilyn Ann Winke (hereinafter "Marilyn") and the Respondent, James B.

Winke (hereinafter "Jim") wish to settle their respective rights and obligations regarding the terms of: 1) a Decree of Separation and 2) a Decree of Dissolution, if one becomes necessary.

3. DIVISION OF OWNERSHIP OF PROGAS SERVICE, INC.: At the time of the execution of this Stipulation and Agreement Jim is the owner of all outstanding shares of stock of Progas Service, Inc.

It is understood by the parties, that the Stipulation and Agreement is a compromise settlement. Jim is of the opinion that none of the shares of stock of Progas Service, Inc. are part of the martial estate because they were gifts from his family. Marilyn is of the opinion that all of the shares of stock of Progas Service, Inc. Are part of the marital estate. The fact that Marilyn is receiving one-half (½) of the stock of Progas Service, Inc. has been taken into consideration by the parties in determining the support issues such as (1) child support, (2) health insurance for Burton, and (3) spousal support, as well as the division of the Retirement Accounts.

With the execution of this Agreement Jim will transfer ownership of the one-half (½) of the stock of Progas Service, Inc. to Marilyn to be held by her in joint tenancy as follows:

"Marilyn Ann Winke and James B. Winke as joint tenants with full rights of survivorship and not as tenants in common."

At the time of the execution of this Stipulation and Agreement, Jim's one-half (½) of the stock will also be changed so as to be held in joint tenancy as follows:

"James B. Winke and Marilyn Ann Winke, as joint tenants with full rights of survivorship and not as tenants in common."

The transfer shall be conditional upon:

(a) each party signing a promissory note made payable to Progas Service, Inc. In the amount of forty thousand four hundred two dollars and twenty-three cents ($40,402.23).

Payment of the promissory note shall be secured by each party pledging the following collateral:

(i) a 1955 Thunderbird automobile and a 1934 Plymouth automobile

Each party agrees not to use his or her stock as collateral or security for a loan or to pledge it for any other purpose.

An option to purchase all of the other party's interest in the

stock of Progas Service, Inc., at a sale price established by two appraisers, one appraiser chosen by each party, is given to Jim and Marilyn. In the event both parties wish to purchase the stock at the price established by the Appraisers, then each party shall submit a sealed bid at a time and place designated by the appraisers. The person submitting the highest bid shall be allowed to exercise his or her option to purchase.

4. PAYMENT OF DEBTS: Except for the debt owing to Progas Service, Inc. in the amount of $40,402.23, all debts of the parties, including both Jim's debts and Marilyn's debts, shall be paid within sixty (60) days of the execution of this Agreement. The parties understand that there is currently money available to retire these debts and agree to use it for the purpose of retiring all financial obligations of the parties except for the debt owed to the corporation. Thereafter, each party will assume all responsibility for the payment of his or her own debts.

5. CHILD CUSTODY: Jim and Marilyn shall have joint legal custody of their minor child, Matthew Burton Winke, d.o.b May 18, 1982 with Marilyn having his physical care.

20. TERMS TO BE BINDING: This Stipulation and Agreement will be binding on the Separate Maintenance Court by

becoming the terms of any Decree of Separate Maintenance and, should it become necessary, this Agreement will be binding on any subsequent Dissolution Court by becoming the terms of any Decree of Dissolution.

Dated at Fort Madison, Iowa this 3rd day of May, 1995.

| | |
|---|---|
| /s/ MARILYN ANN WINKE | /S/ JAMES B. WINKE |
| Marilyn Ann Winke | James B. Winke |
| Petitioner | Respondent |

State of Iowa )
)ss:
County of Lee )

I, Marilyn Ann Winke, being first duly sworn, depose and state that I am the Petitioner in the above-entitled dissolution of marriage action; that I have read the above and foregoing Stipulation and Agreement and that the statements therein contained meet with my approval and are true and correct as I verily believe.

/s/ Marilyn Ann WInke
Marilyn Ann Winke

Subscribed and sworn to before me this 2nd day of May, 1995.

/s/ William J. Cahill

Notary Public - State of Iowa

State of Iowa )
)ss:
County of Lee )

I, James B. Winke, being first duly sworn, depose and state that I am the Respondent in the above-entitled dissolution of marriage action; that I have read the above and foregoing Stipulation and Agreement and that the statements therein contained meet with my approval and are true and correct as I verily believe.

/s/ James B. WInke
James B. WInke

Subscribed and sworn to before me this 3rd day of May, 1995.

/s/ Rebecca E. Gerst

Notary Public - State of Iowa

*Minutes of Special Meeting of Stockholders*

We, the undersigned, being all of the stockholders of Progas Service, Inc., do hereby waive any and all notices as provided by law of the State of Iowa, or by the Articles of Incorporation of this corporation, of the time and place and purpose of a special meeting of the stockholders of said corporation and do hereby fix the 28th day of December, 1988, at two o'clock P.M. as the time and office of the corporation at 1030 Avenue H, Fort Madison, Iowa, as the place of said special meeting for the transaction of such business as may come before said meeting.

/s/ Leo B. Winke
Leo B. Winke, President
/s/ Fred C. Winke
Fred C. Winke, Vice-President
/s/ Albertine M. Winke
Albertine M. Winke, Secretary
/s/ James B. Winke
James B. Winke, Treasurer

**APPENDIX G**

The following were elected as directors of the corporation:

Fred C. WInke and James B. Winke

The State Central Savings Bank and Fort Madison Bank and Trust were designed as the principal banks of the corporation. Fred C. Winke and James B. Winke were authorized to draw checks for the corporation.

The Resolution of Corporate Board, dated December 28, 1988, prepared by State Central Savings Bank for the purpose of borrowing the sum of $200,000.00 was discussed and execution of the same approved by the Board.

The accounting firm of Georg Robinson and Co. was designated as the accountants for the corporation.

There being no further business coming before the meeting, the meeting was thereupon adjourned.

/s/ Leo B. Winke
Leo B. Winke
/s/ Albertine M. Winke
Albertine M. Winke
/s/ Fred C. Winke
Fred C. Winke
/s/ James B. Winke
James B. Winke

Law Offices of
ASPELMEIER, FISCH, POWER, WARNER & ENGBERG P.L.C
Valley Savings Bank Building
321 N. Third Street - P.O. Box 1046
BURLINGTON, IOWA 52601
319-754-6587
Date 1/07/97 008580

PROGAS SERVICE, INC.

1030 Avenue H

Fort Madison, IA 52627

**********

TO LEGAL SERVICES

10/25/96 TELEPHONE CONFERENCE JIM MILLER WSP .25

10/29/96 CONFERENCE WITH JIM MILLER WSP 1.50

11/01/96 EXTENDED TELEPHONE CONFERENCE WSP 1.00

MIKE WALKER, REVIEW OF DOCUMENTS

11/07/96 TELEPHONE CONFERENCE JIM MILLER WSP .25

12/04/96 TELEPHONE CONFERENCE MARILYN WSP .50

WINKE AND CONFERENCE JIM MILLER

12/05/96 TELEPHONE CONFERENCE MARILYN; WSP 1.00

REVIEW COMPLAINT; WORK TO LOCATE

K.C., KS ATTORNEY AND INFORMATION

FROM KS. SECRETARY OF STATE

**APPENDIX H**

12/10/96 TELEPHONE CONFERENCE MARILYN WSP .25

12/12/96 TELEPHONE CONFERENCE MARILYN; WSP .25

CONTACT KS SECRETARY OF STATE

12/16/96 TELEPHONE CONFERENCE MR. BIGUS WSP .25

12/17/96 TELEPHONE CONFERENCE MR. BIGUS, WSP .75

MARILYN & JIM MILLER

12/18/96 TELEPHONE CONFERENCE MARILYN WSP .25

12/31/96 TELEPHONE CONFERENCE TED FAY & WSP 1.00

& ASSOCIATE; PREPARE AND FAX LETTER;

REVIEW PROPOSED ANSWER; LETTER TO

MR. BIGUS.

SERVICE DUE PER THIS STATEMENT 797.50

TO DISBURSEMENTS

12/06/96 COPY CHARGE 5.00

12/31/96 FAX CHARGE 13.50

TOTAL DISBURSEMENTS 18.50

TOTAL DUE THIS STATEMENT 816.00

**NOTICE OF MARILYN ANN WINKE INVOKING OPTION TO PRUCHASE**

*COMES NOW* Marilyn Ann Winke, by and through her attorneys, Cray, Goddard, Miller & Taylor, L.L.P, and herein notifies James B. Winke of Marilyn Ann Winke invoking her option to purchase James B. Winke's shares of stock pursuant to paragraph 3 of the Stipulation Agreement filed in the parties dissolution of marriage action. Marilyn Ann Winke would further notify James B. Winke that she is in the process of determining her appraiser and will provide notification of the name, address and other pertinent information relating to Marilyn Ann Winke's appraiser as soon as such is determined.

Dated this the 14th day of October, 1996

CRAY, GODDARD, MILLER & TAYLOR, L.L.P.
/S/ JAMES W. MILLER
James W. Miller (000007642)
205 Washington Street, Suite 300
P.O. Box 606
Burlington, IA 52601
Phone: (319) 752-4537
ATTORNEY'S FOR MARILYN ANN WINKE

**APPENDIX I**

Law Offices of

ASPELMEIER, FISCH, POWER, ENGBERG, & HELLING

P.L.C.

321 N.Third Street - P.O. Box 1046

BURLINGTON, IOWA 52601

PHONE NO. 319-754-6587

FAX NO. 319-754-7514

April 29, 2005

James B. Winke
507 Avenue E
Fort Madison, IA 52627

Dear Mr. Winke:

Mr. Derby and I are in receipt of your communication dated April 29, 2005 received via fax. Please read my letter of April 26, 2005 carefully. In the last paragraph, I explained why Mr. Derby "is no longer inclined" to cooperate with you with respect to your requests for information from certain banks. This is not a revocation of your requests for all purposes, but rather is an indication that if your requests have no basis in fact and appear to be an unjustifiable waste of time and money for everyone

concerned, consent will not be given.

A case in point is your recent request to Mr. Krause of MidWestOne Bank concerning what appears to be an imaginary $30,000.00 bank wire to the account of Progas Service, Inc. at the bank in April of 1997.

The justification for your request for information presented in the penultimate paragraph of your April 29, 2005 letter is totally inadequate. You have provided no information as to how you came to know the amount of the bank wire, who the wire might have been from, or why any person in their dealing with Progas Service, Inc. would have had reason to bank wire such a large sum of money to the corporation. As already demonstrated, the account activity statement, which the Temporary Receiver has every reason to believe is correct, shows no such transaction. Unless you can provide more tangible evidence of why you believe such a transaction took place, the Temporary Receiver is still not inclined to cooperate with your request. In short, your unverified suspicions are not sufficient, in large part because such requests in the past have turned out to be unproductive if not bogus.

You need not continue to remind Mr. Derby of Judge Wilson's ruling dated May 18, 2000. You have attached a copy of

all or a portion of this ruling to literally dozens of pervious filing and you can be certain that we continue to be aware of it.

Unless you present some believable, documentable, or plausible reason why the Temporary Receiver should cooperate in your request, Mr. Derby is not inclined to reconsider his position.

Very truly yours

/s/ Wm. Scott Power

Wm. Scott Power

ASPELMEIER, FISCH, POWER,

ENGBERG & HELLING, P.L.C.

WSP/reg

cc: Jerry Derby

Larry Marcucci

Judge Daniel P. Wilson

Jerry Krause

Richard Fehseke

P.S. I have just had a change to review your Addendum to the April 29, 2005 letter. Your Addendum completely fails to show any reason why there is any reason to believe that $30,000.00 was bank wired to Progas Service, Inc's account at Midwest Federal Savings & Loan Association in April of 1997. You simple

addition of $30,000.00 to the account balance existing on April 16, 1997 is correct from a math standpoint, but still provides no clue whatsoever as to the source of the imaginary bank wire funds.

Next you allege "upon the information and belief" that the undersigned was representing Midwest Federal at the same time the Temporary Receiver was making application to the court to borrower funds from Midwest Federal, which would have been a conflict of interest. This is the sort of irresponsible assertion which has put the Temporary Receiver in a position to no longer be inclined to cooperate with your baseless and irresponsible requests for information. Neither the undersigned or anyone in this firm has ever represented Midwest Federal Savings & Loan Association or any of its successors in any capacity. Once again, your information and belief is not only incorrect, but merely another in a long line of false and deceitful statements put forth in writing and distributed to whomever you see fit to distribute your filings and letter in this proceeding.

Law Offices of
ASPELMEIER, FINCH, POWER, WARNER & ENGBERG,
P.L.C.
321 N.Third Street - P.O. Box 1046
BURLINGTON, IOWA 52601
PHONE NO. 319-754-6587
FAX NO. 319-754-7514

May 24, 2000

Mr. James B. Winke
2185 303rd Avenue
Fort Madison, IA 52627

Ms. Marilyn A. WInke
10 Harmony Court
Fort Madison, IA 52627

RE: Sale of Tanks to Jerry's Progas

Dear Mr. And Mrs. Winke:

By order of Judge Wilson, Jerry Derby, as Temporary Receiver, is authorized to sell a number of propane tanks to Jerry Potts unless you submit written offer matching or exceeding Mr. Potts' offer to either Mr. Derby or myself by the close of business on Thursday May 25, 2000. Please be advised that Mr. Potts' offer is now $231,566.50 for 729 tanks. The total gallons involved is 421,030. These new figures, which exceed Mr Potts' original offer as approved by the court, was made after Mr. Derby and Mr. Potts spent a day in Eldon verifying and confirming the gallonage involved in the transaction. Please note that the bid is $8,091.05

**APPENDIX K**

higher than Mr. Potts' original offer. Hence, any offer you make will either have to meet or exceed the amount of $231,566.50. If no offers are received with verified financing on or before Thursday of this week, the Temporary Receiver will proceed to close the tank transaction with Mr. Potts as soon as feasible.

Very truly yours,

/s/ Wm. Scott Power

Wm. Scott Power

ASPELMEIER, FISCH, POWER

WARNER & ENGBERG P.L.C.

WSP/reg

cc: Jerry Derby